

Fernandes v Skanska USA Building Inc.

2007 NY Slip Op 34191(U)

December 18, 2007

Supreme Court, New York County

Docket Number: 0109840/2004

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ACOSTA
Justice

PART 61

FERNANDES, GABRIEL

INDEX NO. 109840/04

- v -

SKANSA USA BUILDINGS INC.,
ETAL

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion


FILED
DEC 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SO ORDERED

Dated: 12/18/07


ROLANDO T. ACOSTA
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Gabriel Fernandes,

Plaintiff,

- against -

Skanska USA Building Inc., and Barney Skanska USA,

Defendants.

DECISION/ORDER

Index No. 109840/04

Seq. No. 3

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing plaintiff's motion for an order permitting the law firm of Day & Associates, PC to release the sum of \$100,000 from its attorney escrow account directly to plaintiff, and permitting attorneys fees to be paid by Travelers:

Papers

Numbered

Order to Show Cause & Affirmation

1 (Exhibits A-J)

**Affirmation & Affidavits in Opposition
(Workers Compensation)**

2 (Exhibits A-E, A-D)

**Affirmation & Affidavits in Opposition
(General Liability)**

3 (Exhibits A-I)

Reply Affirmation

4 (Exhibits A-E)

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The facts of the underlying action are set out in this Court's Decision and Order granting plaintiff partial summary judgment on his Labor Law 240(1) claim. See Decision and Order dated February 21, 2007, Motion Seq. 2, in Supreme Court File. Defendants Skanska USA Building Inc., and Barney Skanska USA ("Skanska") were the "Design/Builder" of a runway at JFK Airport. Skanska subcontracted the concrete work to Ruttura & Sons Construction Co ("Ruttura"). Plaintiff, an employee of Ruttura, was injured when the bucket of a backhoe struck him in the head.

Skanska instituted a Contractor Controlled Insurance program, where it would pay all the premiums for the various policies issued by St. Paul Fire and Marine Insurance Company (now known as Travelers). Accordingly, a subcontractor's bid would be discounted to reflect

* 3]
Skanska's insurance premium payments. Thus, Ruttura's bid was discounted to reflect what would have been worker's compensation premiums paid by Skanska. At issue in the case are two policies issued by Travelers. Policy WVW2997001 provided only worker's compensation coverage to Ruttura and Policy KK02900237 was issued to Skanska as a general liability policy.

During pre-settlement negotiations, Bonnie Smith, Director for the Travelers Indemnity Company, negotiated the worker's compensation lien component of the negotiations, and Milena Ivanis, Traveler's National Director of Construction Claims, handled the liability component. The matter went into mediation twice, once by Court mediator, and the second time by JAMS. By the end of the second mediation, it was clear that plaintiff would settle the matter at \$1.5 million provided the lien was waived. Ivanis had authority to settle the matter for \$1.4 million plus the lien waiver, but could not waive the lien at a greater amount, only Smith had the authority to do so.

On February 16, 2007, Ivanis settled the liability portion for \$1.5 million, but allegedly told plaintiff's counsel that he would have to negotiate the lien with Smith. According to Smith, she and plaintiff's counsel discussed the matter over the telephone that same day, but no agreement was reached on the lien. Accordingly, she drafted a letter to counsel that Travelers (as the workers' compensation carrier) did not consent to the settlement and that no agreement on the lien had been reached, and requested that counsel hold \$100,000 in escrow pending resolution of the lien issues. The letter, although dated February 16, 2007, was sent by certified mail on February 22. Approximately three weeks later, counsel received a check for \$1.5 million from Ivanis without any stipulations or lien language.

Plaintiff now seeks the release of the \$100,000 in escrow directly to him on three grounds. First, citing Pennsylvania General Ins. Co. v. Austin Powder Co., 68 N.Y.2d 465 (1986), he argues that Travelers has no right of subrogation against its own insured from a claim arising from the very risk for which the insured was covered. The anti-subrogation rule, however, does not apply to the facts of this case because Travelers' general liability policy issued to Skanska covered a different risk than the worker's compensation policy issued to Ruttura. North Star reinsurance Corp. v Continental Insurance Co., 82 N.Y.2d 291, 295 (1993); cf. Hartford Acc. & Indem. Co. v Michigan Mut. Ins. Co., 61 N.Y.2d 569, 573 (1984) (in defending two insureds under a GCL, Michigan Mutual could not refuse on antisubrogation grounds to implead an additional insured under that policy where that insured would have been covered only under a separate workers' compensation policy also issued by Michigan Mutual inasmuch as the GCL and workers' compensation policies did not cover the same risk).

Second, he argues that since Travelers provided both general liability and workers compensation insurance, it was incumbent on Travelers to unambiguously state that it was

not waiving the lien. Its failure to do so, waived the lien by impliedly consenting to the settlement. Although Travelers provided both policies, the policies were different and were administered by different departments. Indeed, negotiations broke down because Smith would not agree to waive the lien at \$1.5 million. In fact on the day that Ivanis settled the claim against Skanska for \$1.5 million, Smith and counsel spoke on the telephone four time and were unable to reach an agreement on the lien. Smith followed the telephone conversations with a letter demanding that counsel place \$100,000 in escrow, which counsel received weeks before receiving the settlement check from Ivanis. Under these circumstances, it cannot be said that Travelers waived the lien.

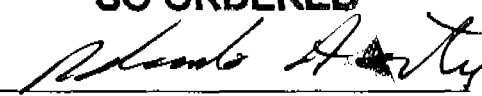
Last, contrary to plaintiff's assertions, Turner v. City of Buffalo, 41 F.3d 57 (2nd Cir. 1994) is not dispositive of this issue. In Turner, the employer's insurer paid the bulk of the liability settlement. The same insurer had also provided a worker's compensation policy. The parties apparently did not dispute the premise that § 29(1) of New York Workers' Compensation Law ("WCL") would give the insurer a lien to recover its worker's compensation payments from its liability obligation, provided that the WCL had mandated those payments. Turner filed a motion to extract from the alleged lien attorney's fees-attorney's fees on top of the monies already contemplated by the settlement agreement. Id. at 59. The Second Circuit affirmed the denial of Turner's motion on the grounds that "there was no § 29(1) lien to begin with. Inasmuch as § 29(1) explicitly limits its application to those 'not in the same employ,' the statute articulates a clear intent to exclude employers." Id. at 61. Instead, WCL states that the workers' compensation insurer "shall have a lien on the proceeds of any recovery from [the third-party tortfeasor]." Id.

In the present case, if Travelers had paid the \$1.5 million pursuant to a general liability policy issued to Ruttura, no lien would have existed pursuant to the reasoning in Turner. But that is not what happened in this case. Rather, the \$1.5 million was paid on behalf of Skanska, a third-party tortfeasor under a separate policy. Accordingly, it is

ORDERED that plaintiff's motion is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Dated: December 18, 2007

SO ORDERED


Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

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